THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0709, State of New Hampshire v. Robert A. Tierney, Jr., the court on August 6, 2007, issued the following order:

The defendant, Robert A. Tierney, Jr., appeals his convictions on ninety-three counts of felonious sexual assault. He argues that the trial court erred in: (1) denying his motion for acquittal; (2) admitting evidence of other bad acts; (3) denying his request to exclude the testimony of the investigating officer; (4) denying his request to sever indictments; and (5) imposing four consecutive maximum Class B felony sentences. We affirm.

The defendant moved for acquittal at conclusion of the State's case and again at the end of all of the evidence. The issue on appeal as to both motions is the same; to prevail on his challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact viewing all of the evidence presented at trial and all reasonable inferences therefrom in the light most favorable to the State could have found guilt beyond a reasonable doubt. State v. Littlefield, 152 N.H. 331, 349-50 (2005).

The victim testified that beginning in January 1986, the defendant sexually assaulted him at least once a week, except when he was at baseball camp. The defendant does not argue that he requested a bill of particulars nor that he asserted lack of opportunity as a defense. Absent evidence of when the baseball camp specifically met, the evidence construed in the light most favorable to the State supports the jury's verdict. See State v. Sweeney, 151 N.H. 666, 673 (2005) (generally State need not prove assault occurred at time alleged in indictment unless it has provided bill of particulars or alleged that offense occurred within specific timeframe and defendant asserts defense of lack of opportunity for entire timeframe).

The defendant next argues that the trial court erred in allowing the State to present evidence that he showered with the victim's older brother during the time period of the assaults charged in this case. We review the trial court's decision on the admissibility of evidence to determine whether its exercise of discretion was sustainable. See State v. Morrill, 154 N.H. 547, 550 (2006).

In this case, the defendant argued that his lack of parental experience and the absence of the victim's father from his life caused them not to know that it was inappropriate to shower together. The trial court ruled that the defendant had created a misleading impression that he and the preadolescent victim had

innocently taken showers together when the victim hopped in when the defendant was showering. To correct that misimpression, the trial court allowed the State to ask two questions: (1) whether the defendant had ever taken showers with the victim's teenage brother; and (2) the age of the brother at the time. The court then instructed the jury: "The fact that the defendant has now testified on cross-examination that he also took showers, he took a shower with [the victim's older brother], you're not to infer from that testimony that any criminal conduct, inappropriate touching occurred between the defendant and [the brother]. You are not to make that inference at all." Given the misimpression, the limited questions and the immediate jury instruction, we conclude that the trial court sustainably exercised its discretion in permitting the admission of this evidence under the doctrine of specific contradiction. See id. at 549-51 (explaining distinction between doctrines of curative admissibility and specific contradiction). While the defendant argues on appeal that the admission of the evidence should have been reviewed under a Rule 404(b) analysis, he did not argue this before the trial court; we therefore will not consider it on appeal. See State v. Blackmer, 149 N.H. 47, 48 (2003). We note, however, that the doctrine of specific contradiction permits the use of otherwise inadmissible evidence.

The defendant next argues that the trial court erred in denying his request to exclude testimony of an investigating police officer. In his limited testimony, the police officer described his training and the course of his investigation. He offered no opinion as to the veracity of any witnesses and provided a basis for the admission of photographs of the residences where the victim and defendant had lived during the period of the assaults. The defendant analogizes the challenged testimony in this case to that in United States v. Lamberty, 778 F.2d 59 (1st Cir. 1985). Unlike the witness in Lamberty, here, the investigating officer offered testimony that was relevant to the offenses charged. Accordingly, we conclude that the trial court's ruling was sustainable. See State v. Kulas, 145 N.H. 246, 248 (2000) (testimony of victim's attorney admissible to explain delayed report by victim of assault and attorney offered no opinion as to victim's credibility).

Nor do we find error in the trial court's failure to sever the indictments. The aggravated felonious sexual assault charge that the defendant argues should have been severed from the ninety-three counts of felonious sexual assault occurred during one of the felonious sexual assaults. When the victim expressed pain, the act ended and the defendant did not attempt that form of penetration during any of the subsequent sexual assaults. Given the escalation of the assaults, the trial court's decision not to sever charges was sustainable. See State v. McIntyre, 151 N.H. 465, 466-68 (2004) (explaining common plan rule for joinder).

Finally, the defendant argues that the trial court erred in sentencing. Sentencing within statutory limits is within the sound discretion of the trial court. State v. Landry, 131 N.H. 65, 67 (1988). The defendant does not argue that his sentence violated statute. Rather, he contends that because it exceeded the

sentence imposed after his first trial in which he was convicted on a charge for which he was acquitted in this case, it is presumptively vindictive. He also argues that the trial court was bound by the sentencing structure imposed in his first trial under the law of the case doctrine.

We note that the judge who presided at trial following remand was not the original trial judge. Moreover, the four indictments for which sentences were imposed comprised a total of ninety-three counts. The judge whose sentence is now under appeal followed the presentence report recommendation and explained his reasons for the sentence. Moreover, the sentence currently under appeal provided incentive for rehabilitation, an important factor given the total sentence imposed and the likelihood of the defendant's eventual release. Based upon the record before us, we find no evidence of vindictiveness and similarly find no merit in the defendant's law of the case argument, see State v. Patterson, 145 N.H. 462, 466 (2000) (explaining application of doctrine of law of the case in sentencing context).

Affirmed.

Dalianis, Galway and Hicks, JJ., concurred.

Eileen Fox,
Clerk